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In the

Supreme Court of the United States

OCTOBER TERM, 1949

A. L. WILLIS, ET AL.....*Petitioners*

Vs.

BARNSDALL OIL COMPANY, ET AL.....*Respondents*

No. 246.

BRIEF OF RESPONDENTS IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI.

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Come now respondents, J. K. Wadley, Barnsdall Oil Company and Standard Oil Company, an Ohio corporation, and with respect, present to this Honorable Court this, their brief in opposition to the petition praying for the issuance of a writ of certiorari and the brief in support thereof filed by Petitioners A. L. Willis, et al.

The petitioners invoke the jurisdiction of this Court under Rule 38(a), paragraph (b), of the Rules of this Court, in that the claim is made that the Court of Appeals for the Fifth Circuit has decided an important question of local law in a way that conflicts with the applicable local decisions. This claim, which is the sole ground brought forward by petitioners for the exercise of the discretion of this Court, we believe is demonstrably er-

roneous, and that the opinions of the Court of Appeals for the Fifth Circuit in the two appeals to that Court are entirely correct and consonant with applicable Texas decisions.

A brief statement of the history and character of this litigation is desirable and appropriate:

STATEMENT OF FACTS.

This suit was filed on December 13, 1943, and has been pending and actively prosecuted by plaintiffs (respondents here) ever since. On January 19, 1944, an amended pleading was filed by plaintiffs. This pleading, upon which the case was tried at the original and second trials, appears at R. 8, et seq.

The gravamen of plaintiffs' bill was twofold:

(a) That Defendant A. L. Willis, an agent employed by Respondent Wadley for the purpose of acquiring oil and gas leases necessary to complete and fill out a certain partially assembled block of acreage known as the Eylau Block in Bowie County, Texas (which said leases, when acquired by Wadley, through the instrumentality of said agent, were to be assigned by said Wadley to other respondents, said assignor to reserve to himself an overriding royalty interest of 1/4th of the 7/8ths working interest, subject to certain expenses of exploration and production, all pursuant to a pre-existing contractual

relation between them), acquired, because of his agency, certain confidential information with regard to the nature and extent of said block of acreage, the location thereof, and the plans of respondents, with respect to the drilling of a well for oil and gas thereon, which enabled him to know and realize the peculiar value to respondents of the Heilbron Tract, a parcel of real estate of approximately 97 acres, which was situated in the geographical center of said lease block; that Willis, knowing and realizing the importance of a lease on said Heilbron Tract to his principal and, knowing that the same was actually unleased and that his principal thought it was already leased to the Texas Company, in violation of his fiduciary duty not to compete with his principal, acquired said lease for himself from the fee owner of the Heilbron Tract in the name, nevertheless, of A. T. Brown, the brother-in-law of Willis, for the purpose of masking effectively his participation in the transaction; that by virtue of these facts, Willis was a trustee *ex maleficio*, guilty of a breach of trust, so that Respondent Wadley was, in equity, the owner of said oil and gas lease at the time the same was bought by Willis in the name of his brother-in-law from Louis Heilbron (July 21, 1943); and,

(b) That independent of whether or not Willis had acquired and used confidential information contrary to his fiduciary obligation to Wadley in the purchase of said lease on July 21, 1943, he was employed on or about

August 12, 1943, by respondents to locate the owner of said lease and to acquire an assignment of said lease from such owner to Respondent Wadley; that Willis accepted said employment without divulging to his employers that he had already bought said lease in the name of A. T. Brown, his brother-in-law, and that said lease was held by said A. T. Brown subject to the ownership and control of said Willis; that said Willis pretended to negotiate with the owner of said lease on behalf of respondents in good faith, all the while being in full control of said lease, with the result that he finally caused the lease to be assigned to Respondent Wadley by A. T. Brown for a consideration of $7500.00 cash and an overriding royalty of 1/4th of the 7/8ths working interest.

The prayer was that respondents recover the $500.00 commission paid Willis for buying the lease from himself, the $7500.00 cash and the 1/4th overriding royalty interest, all of which were secret profits acquired by an unfaithful agent in contravention of the fiduciary duty, through a breach of trust.

On the first trial, which was had on May 18, 1944, the judgment of the trial court was in favor of defendants on the theory that Willis was not the character of agent which owed respondents any fiduciary duty not to profit by confidential information received in the course of his employment. On appeal to the Court of Appeals for the

Fifth Circuit, two opinions were rendered: *Barnsdall Oil Company, et al., vs. Willis, et al.*, 152 Fed. (2d) 824, and, on rehearing, *Barnsdall Oil Company, et al., vs. Willis, et al.*, 153 Fed. (2d) 784.

After listing the findings of fact made at the first trial, the Court of Appeals was at a loss to understand how the trial court could have made such findings, and observed (page 829 of original opinion):

> " . . . It is impossible to determine what effect the erroneous conclusion as to the lack of agency and as to the duty of the special agent or broker had upon the Court in making its findings.
>
> "The testimony of Willis, which the court accepted, is contradicted by that of Wadley, and in parts by other witnesses. His concealment of his connection with the Heilbron lease tends to his discredit. If he in truth had no confidential information concerning the value and desirability of this lease at the time he bought it, derived from his previous activities as plaintiffs' agent to purchase other leases, such concealment would not itself make him a trustee of the Heilbron lease and may not have damaged his principals when they bought it from him at a price which they agreed to pay, making no offer to rescind on discovery of the truth. Compare *Kilbourne vs. Sunderland*, 130 U. S. 505, at page 517, as to Square No. 115. But the factual question as to whether Willis obtained confidential information out of his special agency is controlling, and it is clear that Willis, after accepting the duty of buying the Heilbron lease, could not charge a commission for buying it secretly from himself. We think a more careful retrial should be had in the light of the principles we

have announced. The judgment is reversed and the cause remanded for such new trial."

And on rehearing, the Court of Appeals further said:

> " . . . It is the purpose of this court to leave the lower court free in finding the facts on the new trial as to whether or not Willis obtained confidential information by virtue of his relation as a lease broker for plaintiffs or either of them, and whether or not he took advantage of such confidential information, if any was so obtained, and used it to his own advantage and to the detriment of the plaintiffs."

The second trial was had on January 6, 1948, with the result that the trial court found and determined as a fact, among other things, that Defendant Willis acquired confidential information of his principal Wadley during the course of his employment and used said confidential information in acquiring, in competition with his principal, on July 21, 1943, the Heilbron lease, to the damage and detriment of said principal; that in so doing, Willis had committed a breach of trust and had reaped secret profits which equity would not allow him to retain; that respondents should recover the $7500.00 cash consideration paid Willis, the 1/4th overriding royalty interest, and $375.00 paid Willis by way of commission for buying the lease from himself, less $291.00, being the sum of money actually paid by Willis to Heilbron for the lease on July 21, 1943. The judgment of the trial court on the second trial appears at R. 50, et seq.

The memorandum of decision filed by the trial court on the second trial on June 23, 1948, appears at R. 37.

It is also reproduced and reported at 78 Fed. Supp. 293. This memorandum of decision was, after its filing, amended by the trial court by striking two sentences therefrom and inserting in lieu thereof certain substituted language. The language stricken and that substituted therefor appears at Supp. R., pp. 4 and 5 (pp. 204-205 in accordance with the consecutive numbering related to the original record). The action of the trial court in so amending the memorandum of decision as originally filed arose by virtue of the trial court's adoption of findings of fact and conclusions of law proposed by respondents after the filing of the original memorandum of decision. Said findings of fact and conclusions of law appear in their entirety at pp. 3-8 of the Supplemental Record (pp. 203-208 in accordance with the consecutive numbering related to the original record). The adoption by the trial court of said findings of fact and conclusions of law as proposed by respondents in their entirety, with certain very minor exceptions, is shown by the order of the district court at R. 49.

Pertinent excerpts from the Court's memorandum of decision as amended follow:

> "The Court finds that, as the geophysical explorations in the area of the Eylau block progressed, C. N. Valerius, the geologist for Barnsdall Oil Company, from time to time reported to J. K. Wadley the results of said exploration, and that J. K. Wadley, in turn, by the buying instructions which he gave to

A. L. Willis, conveyed the substance of such information to Willis, who knew that the leases he was buying were being bought on the basis of the results of the geophysical exploration; and that J. K. Wadley also told Willis that a block of leases was being assembled which were to be assigned to Barnsdall and that Barnsdall intended to drill a well on the block." (Supp. R. 5.)

"The Court further finds that, when Willis' testimony was taken after this suit was filed, he turned up with a map made by C. N. Valerius and by draftsmen of Barnsdall Oil Company working under the direction of Mr. Valerius, and the Court finds, as a matter of fact, that this was a confidential map of Barnsdall Oil Company and that it gave Willis confidential information as to the location of the leases, knowledge as to the acquisition of leases, both recorded and unrecorded, the exact placement, identification and orientation of leases in the block, the way the block was shaping up, and the holes or gaps in the block." (Supp. R. 5.)

" . . . This information confirmed, in large measure, the reports of geologists whom Wadley had previously employed to cover the same area, and which also showed the center of the block both in area and geographically as approximately the Heilbron property. Shortly after Barnsdall had completed its survey and determined to drill, Willis, with the information obtained from Wadley, and from access to the latter's office, went to Shreveport on July 20th, 1943, where he inquired and was informed that Phillips Petroleum Co. had released the Heilbron property. On the next day, July 21st, he obtained a lease thereon in the name of his brother-in-law, A. T. Brown, under the circumstances detailed in the original opinion by the Court of Appeals found in the 5 Cir., 152 F. 2d 824." (R. 38.)

And (R. 40):

"Under the facts and circumstances thus revealed it is the conclusion of this court that Defendant Willis did take advantage of confidential information, which he would not have received but for his employment by Wadley with respect to other leases and the access this gave him to the office and records of Wadley. This information he used for his own advantage and enrichment to the prejudice and loss of both Wadley and Barnsdall."

"Having found all these facts, under the authorities cited by the Court of Appeals, the plaintiffs are entitled to recover all that Willis received from the Heilbron lease less the sum of $291.00, which he actually paid when taking it in the name of his brother-in-law, Brown.

"Proper decree should be presented."

In addition, the trial court, on the second trial, made the following findings in respect of Willis' breach of trust (Supp. R. 3):

"1.

"The defendant Willis obtained confidential information by virtue of his relation as a lease broker for Wadley which he would not have received but for his employment by Wadley.

"2.

"The defendant Willis used this confidential information, which was obtained by virtue of his employment by Wadley, to his own advantage and enrichment and to the prejudice and loss of both Plaintiffs Wadley and Barnsdall Oil Company."

Petitioners say, at page 17 of their brief:

> " . . . The only question presented to the Fifth Circuit Court of Appeals in this case was the question of ratification and waiver."

This is correct. The overwhelming weight of the evidence was that Petitioner Willis had imposed on his employer Wadley and was guilty of a breach of trust in purchasing for himself a lease in the name of his brother-in-law, A. T. Brown, on the central tract of land in the lease block which it was petitioner's duty to close and fill for the exclusive benefit of Wadley. No attack was made on the findings of the trial court as to Willis' breach of trust, made on the second trial, nor could any have been made in view of the conclusive establishment of the abuse of Wadley's confidence by all evidence save that alone of Respondent Willis. Accordingly it now remains for us to examine the narrow technical claim advanced by respondents that they are entitled to avoidance of the breach of trust of which Willis stands convicted because of supposed ratification and waiver.

ARGUMENT.

The Issues of Ratification and Waiver Were Decided Correctly in Accordance With the Law of Texas.

(a) Respondents Are Not Required to Tender Back the Lease in Order to Recover Secret Profits Arising From a Breach of Trust.

Petitioners state (pp. 19, et seq., of their brief) that the fraud and imposition of A. L. Willis was discovered on December 5th or 7th of 1943, that this suit was filed December 13, 1943, specifically alleging the acts constituting the breach of trust, and that at the time of the discovery of Willis' fraud, respondents were in the process of drilling a well upon the disputed Heilbron lease. All this is correct. Petitioners further say that at no time, after discovering the fraud and breach of trust on the part of Willis, did respondents tender back the assignment of the lease to Willis, and that respondents' failure so to tender back said lease and demand a refund of the $7500.00 consideration paid, amounted to a condonement of petitioner's fraud and a waiver of the cause of action based thereon.

We submit that in so contending, petitioners and their counsel have entirely mistaken the nature and theory of respondents' claim against Petitioner Willis. This action was brought for the recovery of secret profits realized

by an unfaithful agent through a breach of trust. No question of an action for rescission or recovery back of consideration paid for the assignment in an action for rescission as such, nor an action for damages based on deceit. is now present or has ever been present in this case. Recovery by respondents against Willis was sought and allowed on the theory that the $7500.00 consideration received by Willis, together with the consideration of the ¼th overriding royalty interest, were secret profits arising out of the breach of trust committed by an unfaithful agent in contravention of the fiduciary duty to his principal. This is the basis of the three opinions rendered by the Court of Appeals for the Fifth Circuit and by the trial court upon the second trial of the case.

If the view of counsel for petitioners should be adopted, then the entire body of jurisprudence dealing with recoveries arising out of trusts *ex maleficio* would be abrogated; for the respondent Wadley would be in the anomalous position of being required by law to tender back a lease which, in equity, was always his because bought by his agent in competition with him and as the result of a breach of trust committed by said agent. Under the findings of the trial court on the second trial as affirmed by the Court of Appeals, the Heilbron lease at the time it was acquired by Willis on July 21, 1943, in equity belonged to Wadley because it was so acquired through a breach of Wadley's confidence. From the instant

of acquisition, Wadley was always the equitable owner thereof. The purpose of this action, then, was to restore the parties to the position in which they would have stood had it not been for Willis' breach of trust. The purchase price of the lease was $291.00, for which Willis is entitled to reimbursement; secret profits realized by him ($7500.00 cash, the ¼th overriding royalty interest, and the commission paid to him for the purchase of his own lease) belong to respondents.

There is nothing in the foregoing which conflicts with Texas law. On the contrary, the governing tenets are well established in Texas jurisprudence. In the case of *Kinzbach Tool Co., Inc., vs. Corbett-Wallace Corp., et al.*, Supreme Court of Texas, March 4, 1943, 160 S.W. (2d) 509, one Turner, an agent of the tool company, undertook secretly with Corbett-Wallace Corporation to negotiate a sale of a "whipstock" agency owned by Corbett-Wallace to his employer, Kinzbach Tool Company. Turner, a trusted employee of the tool company, behind the back of his employer, agreed to negotiate the sale, and upon the successful consummation of the same, to receive from Corbett-Wallace Corporation a commission of $5,000.00. The contract was successfully negotiated, but Turner was denied the right to receive any secret commission on the ground that the same arose through a plain breach of fiduciary duty. The court said:

"The term 'fiduciary' is derived from the civil law. It is impossible to give a definition of the term that is comprehensive enough to cover all cases. Generally speaking, it applies to any person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity. It contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction. The term includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations. 25 C. J., p. 1118; Peckham vs. Johnson, Tex. Civ. App., 98 S.W. 2d 408; Johnson vs. Peckham, 132 Tex. 148, 120 S.W. 2d 786, 120 A.L.R. 720; Swiney vs. Womack, 343 Ill. 278, 175 N.E. 419; Abbitt vs. Gregory, 201 N. C. 577, 160 S.E. 896; Niland vs. Kennedy, 316 Ill. 253, 147 N.E. 117; Lindholm vs. Nelson, 125 Kan. 223, 264 P. 50; Roecher vs. Story, 91 Mont. 28, 5 P. 2d 205; Roberts vs. Parsons, 195 Ky. 274, 242 S.W. 594; Seely vs. Rowe, 370 Ill. 336, 18 N.E. 2d 874; Bliss vs. Bahr, 161 Ore. 79, 87 P. 2d 219. Authorities could be cited from practically every State in the Union, supporting the above-stated rule, but we deem that the ones above cited are sufficient."

* * * *

"We are unable to agree that the facts of this case bring it within any rule that would make Turner's act and conduct in this instant measure up to the rule of fair dealing and good faith toward Kinzbach, which the law required of him. It is the duty of a fiduciary to deal openly, and to make full disclosure to the party with whom he stands in such relationship. Mechem on Agency, p. 784, sec. 953; Id., p. 314, sec. 469; Parks vs. Schoellkopf Co., Tex. Civ. App., 230 S.W. 704; Scott vs. Weaver, Tex. Civ. App., 2 S.W. 2d 870; Peckham vs. Johnson, Tex. Civ. App., 98 S.W. 2d 408; Johnson vs. Peckham, 132 Tex. 148, 120 S.W. 2d 786, 120 A.L.R.

720. One occupying a fiduciary relationship to another must measure his conduct by high equitable standards, and not by the standards required in dealings between ordinary parties."

* * * *

"It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired. It is the law that in such instances if the fiduciary 'takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he must account to his principal for all he has received.' United States vs. Carter, 217 U.S. 286, 30 S. Ct. 515, 520, 54 L. Ed. 769, 775, 19 Ann. Cas. 594. See also Ash vs. A. B. Frank Co., Tex. Civ. App., 142 S.W. 42; Armstrong vs. O'Brien, 83 Tex. 635, 19 S.W. 268."

In the case of *Parks vs. Schoellkopf Co.*, Court of Civil Appeals, Texas, 230 S.W. 704, the Court said:

" 'The well-settled and salutory principle that a person who undertakes to act for another shall not in the same matter act for himself, results also in the other rule that all profits made and advantage gained by the agent in the execution of the agency, belong to the principal; and it matters not whether such profit or advantage be the result of the performance or the violation of the duty of the agent, if it be the fruits of the agency. If his duty be strictly performed, the resulting profit accrues to the principal, as the legitimate consequences of the relation. If profits accrue from his violation of a duty while executing the agency, that likewise belongs to the

> principal, not only because the principal has to assume the responsibility of the transaction, but also because the agent cannot be permitted to derive advantage from his own default. It is only by rigid adherence to this rule that all temptation can be removed from one in a fiduciary capacity to abuse his trust or seek his own advantage in the position which it affords him.' 1 Mechem on Agency (2d Ed.), Sec. 1225.
>
> "An agent cannot avail himself of his agency to do for his own benefit that which injures or affects his principal. Borden vs. Houston, 2 Tex. 606, 607."

The foregoing quotations from Texas cases, including pronouncements of the highest court of the State and the cases therein cited, should be conclusive of the fact that, as in every other jurisdiction of which we have knowledge, Texas requires an unfaithful agent to disgorge and account for secret profits which he derives by breach of his fiduciary duty. The Court of Appeals for the Fifth Circuit so held in all of its opinions. It will be observed that special reliance was placed by that Court in its original opinion dated January 12, 1946, upon *7 Texas Jurisprudence,* 386, paragraphs 1 and 2, 433. paragraph 45, and 402, paragraph 21, all of which are to the same effect as the Texas authorities above cited.

The well-nigh universal rule is succinctly stated in Sections 199 and 200 of the American Law Institute's *Restatement of the Law of Restitution,* which are, respectively, as follows:

"Section 199. Where a fiduciary acquires property by competing with the beneficiary, in violation of his duty to the beneficiary, he holds the property upon a constructive trust for the beneficiary.

"Section 200. Where a fiduciary, in violation of his duty to the beneficiary, acquires property through the use of confidential information, he holds the property so acquired upon a constructive trust for the beneficiary."

To the same effect is Section 395 of the American Law Institute's *Restatement of the Law of Agency.*

In view of the foregoing authorities, we submit it is legal nonsense for petitioners now to claim that Respondent Wadley was under a duty to tender back the lease which he owned in equity because of the constructive trust which arose in his favor on July 21, 1943, when his agent abused his confidence.

The trial court upon the second trial made certain findings of fact and conclusions of law with respect to the claim advanced by petitioners that Respondent Wadley should have tendered back the lease. These findings of fact and conclusions of law are found at Supplemental Record, pp. 4 and 6, and we now set them out, as amended at page 49 of the record.

The findings of fact are as follows:

"3.

"At the time the misconduct of Willis was dis-

covered, plaintiffs had expended large sums of money in the exploration of the Eylau block and in the drilling of one well and were preparing to drill a second well on the Heilbron lease. In these circumstances, it is inequitable to require plaintiffs to tender back the lease to the defendant Willis before bringing this action, and in view of these facts, they were not required to tender back the lease."

The conclusions of law on his proposition are as follows:

"2.

"As a matter of law, plaintiffs were not required to tender back the lease, because this is an action to impress a constructive trust upon profits realized by an unfaithful agent through a breach of trust.

"3.

"As a matter of law, plaintiffs did not ratify the misconduct of Willis by failure to tender back the lease at the time such misconduct was discovered, and did not waive their right of action by failing to tender back the lease, and the failure of plaintiffs to tender back the lease does not act as an estoppel against the plaintiffs."

All the Texas authorities cited by petitioners' counsel in support of their claim that Wadley should have tendered back the lease deal with actions for rescission or damages in connection with contracts negotiated and made at arm's length. None of them has any element of fiduciary relationship, which is the very heart of the cause of action asserted by these respondents. Even a cursory

glance at the cases cited by petitioners will reveal that they are definitely not in point.

Albeit they may have had a right to rescind the contract of assignment between A. T. Brown and J. K. Wadley, and tender back the assignment and sue for the return of the purchase money on account of Willis' fraud practiced on and after August 12, 1943, in failing to reveal the fact that he was dealing on both sides of the table, respondents are under no legal compulsion to plead and assert such cause of action; for they have the right, as they have chosen to do, to assert and prosecute actively the cause of action based upon the breach of fiduciary duty committed by Willis, which was complete at the time he purchased the lease from Heilbron on July 21, 1943.

As was observed by the Court of Appeals in its first opinion and the excerpt therefrom which we have included in the foregoing pages of this brief, if Willis, at the time he bought the Heilbron lease, had no confidential information concerning the same, and concealed his ownership of the lease at the time he sold it through his straw man Brown to Wadley, such conduct alone might not make him a constructive trustee. In accordance with the principle embodied in the case of *Kilbourne vs. Sunderland*, 130 U.S. 505, 321 L. Ed. 1005, as to Square No. 115, respondents' remedy in these circumstances would have been to throw up the bargain and sue for recovery of the consideration paid, or damages, or both.

But, as observed by the Court of Appeals in the same opinion, "the factual question as to whether Willis obtained confidential information out of his special agency is controlling * * *," and this issue having been found in favor of respondents and against petitioners, and such finding being unimpaired, and unattacked for that matter, the question of rescission and the authorities dealing therewith are entirely beside the point.

That a principal may have recovery against an unfaithful agent for breach of trust is not only well established in the Texas authorities, but also in the Federal authorities. *Pratt vs. Shell Petroleum Corp.*, 100 Fed. (2d) 833; *Russell vs. Republic Production Co.*, 112 Fed. (2d) 663; and *Ohio Oil Co. vs. Sharp*, 135 Fed. (2d) 303.

(b) Barnsdall's Method of Rendition of Taxes Did Not Constitute a Waiver of Respondents' Right of Action Against Willis, or Ratification of His Fraud.

The burden of petitioners' counsel's argument on this branch of the case is that one Charles Gillespie, an employee of Barnsdall Oil Company, caused said company to assess and pay taxes on 3/4ths of the 7/8ths of the leasehold interest of the Heilbron lease, and the remaining 1/4th of the 7/8ths of said leasehold interest to be assessed to A. L. Willis, respondent, in accordance with the terms of the assignment of the lease from A. T. Brown to J. K.

Wadley (the interest so acquired by J. K. Wadley having been subsequently assigned to Barnsdall Oil Company, et al.). The claim is made by petitioners' counsel that by so assessing and paying taxes, Barnsdall Oil Company recognized the interest of Respondent Willis in the ¼th overriding royalty interest in dispute in this litigation, and waived its right to recover such interest.

The testimony of W. N. McDuffie, Tax Assessor of Bowie County, Texas, in regard to this tax matter, appears at R. 138 et seq. At the trial it was offered and received on the theory that it constituted an admission against interest by Barnsdall Oil Company (R. 140). It was not offered as a waiver of the cause of action. Objection was made to the introduction of the testimony of McDuffie and the exhibits thereto, on the ground (a) that the testimony was irrelevant (R. 139), (b) that there was no showing that Gillespie was authorized to bind Barnsdall Oil Company (R. 140), (c) that no proper predicate was laid for the testimony (R. 140), and (d) that the testimony was incompetent (R. 143).

The Court made the following findings of fact and conclusions of law with regard to the alleged waiver:

Finding of fact:

> "None of the plaintiffs intended to, or, in fact, did waive or relinquish any right to recover against the defendants by reason of the actions or statements of

the plaintiff's, Barnsdall Oil Company's, tax commissioner with respect to the assessment of taxes on the Heilbron lease, and defendant did not change his position or suffer any disadvantage as a result thereof." (Suppl. R. 4, and R. 49.)

Conclusion of law:

"As a matter of law, plaintiffs did not waive their right of action by reason of the conduct of Barnsdall Oil Company's tax commissioner with respect to the assessment of taxes on the Heilbron lease, nor are plaintiffs in any wise estopped by reason of any act or conduct of said tax commissioner." (Supp. R. 7.)

The position of petitioners is legally untenable for several reasons:

(1) The Elements of Waiver Are Lacking. The Intention to Waive, as Well as Knowledge of the Right, Are Essential.

Waiver is the *intentional* relinquishment of a *known* right.

In the case of *Szanto vs. Pagel*, 47 S.W. (2d) 632, the Court of Civil Appeals at Austin said:

"It is 'the fundamental rule that no one can be bound by a waiver of his rights unless such waiver is distinctly made with full knowledge of the rights which he intends to waive, and a knowledge of all the facts and circumstances affecting such rights.' Ferguson vs. Mounts (Tex. Civ. App.), 281 S.W. 616, 621. Or, as is held in Missouri, K. & T. Ry. Co. vs. Hendricks, 49 Tex. Civ. App. 314, 108 S.W. 745, a 'waiver is the intentional relinquishment of a known

right or such conduct as warrants an inference of the relinquishment of the right, and it never occurs unless intended, or where the act relied on ought in equity to estop the person from denying it.' Baldridge vs. Cook, 27 Tex. 565; Panhandle Refining Co. vs. Bennett(Tex. Civ. App.), 13 S.W. (2d) 923."

As stated in *43 Tex. Jur.*, at page 900:

"The party who claims a waiver assumes the burden of proving the facts on which he relies to establish it, and the intention to waive must be proved like any other fact.

"Waiver must be clearly proved, that is, the proof must amount to more than a scintilla of evidence, surmise or suspicion."

In the same volume, on pages 897-898, we find this statement:

"As already remarked (Sec. 2), waiver is the relinquishment of a right by word or conduct. It may be either express or implied, but in the absence of an express renunciation a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled to his prejudice into the honest belief that such waiver was intended or consented to."

From *City of Wichita Falls vs. Bruner*, 191 S.W. (2d) 912, at page 916, we quote the following:

"Waiver, as distinguished from estoppel, means the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. The Praetorians vs. Strick-

> land, Tex. Com. App., 66 S.W. (2d) 686. In the absence of an express renunciation of a right, a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby. 43 Tex. Jur. 897, Sec. 6."

In *67 C. J.* 289 we find the following definition of "waiver":

> " 'Waiver' has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. * * * "

To the same effect as the foregoing, there is a host of Texas authorities, including the following cases: *Goodwin vs. Abilene State Bank*, 20 S.W. (2d) 1090, Texas Court of Civil Appeals; *Hines vs. Jordan*, 228 S.W. 633, Texas Court of Civil Appeals; *Adams vs. Paton & Company*, 173 S.W. 546, Texas Court of Civil Appeals, which holds that intention is an essential element of waiver and that it must be proved like any other fact; *Metzler Bros. vs. Johnson*, 45 S.W. (2d) 263, Texas Court of Civil Appeals, which holds that "the question of waiver is ordinarily a question of fact for the jury"; *Futrell vs. Martin*, 40 S.W. (2d) 946, Texas Court of Civil Appeals; *DeWitt vs. Kent County*, 148 S.W. (2d) 213, Texas Court of Civil Appeals; *City of Waco vs. Thralls*, 172 S.W. (2d) 142, Texas Court of Civil Appeals; *M. K. & T. Ry. Co.*

vs. Hendricks, 108 S.W. 745, Texas Court of Civil Appeals.

(2) The Proof Failed, Both as to Intention and Knowledge.

Bearing in mind the holding in *City of Wichita Falls vs. Bruner, supra,* that "in the absence of an express renunciation of a right, a waiver will not be presumed or implied contrary to the intention of the party whose rights will be injuriously affected thereby," it is clear that there is nothing in the testimony of McDuffie that would justify a finding that Gillespie *intended* to relinquish the company's rights in the overriding royalty interest in order to avoid paying taxes on that interest for 1947. That is too great a strain on the credulity of reasonable minds. The testimony of McDuffie shows that both of them knew that this is a producing lease of considerable value. The proof also fails to show the other essential element of waiver, viz., that Gillespie had "a knowledge of all the facts and circumstances affecting such rights," for it is not even shown that Gillespie knew about the pending suit or of respondents' right to recovery of the overriding royalty interest. If Gillespie's only knowledge of the overriding royalty interest was gained from the lease and assignments of record in the County Clerk's office, these instruments would show that respondents owned only 3/4ths of the 7/8ths working interest. In fact,

for many weeks after A. T. Brown assigned the Heilbron lease to Wadley, reserving an overriding royalty interest, the respondents themselves believed (being then in ignorance of Willis' purchase of the lease from Heilbron on July 21, 1943) they had only the 3/4ths of 7/8ths working interest assigned by that instrument, and naturally they would set up their records according to the instrument to show the ownership of that interest. Gillespie would naturally rely upon the records showing that appellees owned only 3/4ths of the 7/8ths working interest, which is, indeed, the interest they do own, until the final judgment for the other 1/4th of the 7/8ths working interest in this cause is sustained.

(3) This Court Knows Judicially From the Record That Respondents Had No Intention of Waiving the Fraud of Willis.

Wadley first learned of the fraud of Willis during the first week in December, 1943, while talking to Louis Heilbron (R. 123-124), confirmed it a "few days after that" when he forced a confession from Willis (R. 125-126), suit was filed immediately on December 13, 1943, and the suit has been pending and actively prosecuted ever since. It has been twice tried and twice appealed. Respondents have asserted their right to recover this overriding royalty interest in their complaint and amended complaints, and in numerous briefs filed both in the trial and appellate courts, by oral argument through their

counsel in both courts, and in every way that litigants can assert their rights. All of this the Court knows from the record. Respondents know of no better way to manifest their intention to claim an interest in property than to go immediately into a court of competent jurisdiction, file suit for the recovery of said interest and diligently prosecute their cause for more than five years. This should be the best and highest evidence of their intention. Surely the presumption attends the long labors of their counsel that they knew what they were doing and had the right and authority to prosecute the suit. Petitioners have failed utterly to establish their defense of waiver. Waiver is the *intentional* relinquishment of a *known* right. There is no proof that Gillespie *knew* what respondents' rights were or that he *intended* to relinquish them, or that he had the right or authority to do so.

(4) Findings Made by District Court and Concurred in by Court of Appeals Are Ordinarily Accepted by the Supreme Court of the United States.

The statement embodied in the foregoing subheading is familiar law. *Texas and N. O. R. Co. vs. Brotherhood Railway and S. S. Clerks,* 74 L. Ed. 1034, 281 U.S. 548; *Alabama Power Co. vs. Ickes,* 82 L. Ed. 374, 302 U.S. 464. Under the Texas decisions cited in subsection (1) hereof, waiver is a fact issue. That issue of fact was determined adversely to petitioners in the trial court, as

is shown by the findings of fact and conclusions of law on this branch of the case, which are reproduced above, and it appears such findings were concurred in by the Court of Appeals. They are supported by substantial evidence. No claim is advanced by petitioners to the contrary. We submit that they are unassailable here.

(5) The Opinion Which Gillespie Gave the Assessor as to the Proper Way to Assess the Overriding Royalty Interest Was Correct According to the Record.

The question was not who would eventually own this interest, or whether respondents were entitled to recover it, but who was the *owner* at the time.

Article 7171 of *Vernon's Annotated Texas Statutes* is as follows:

> "All real property subject to taxation shall be assessed to the owners thereof in the manner herein provided; but no assessment of real property shall be considered illegal by reason of the same not being listed or assessed in the name of the owner or owners thereof."

The interest claimed by Willis was reserved in the assignment of the lease by A. T. Brown to J. K. Wadley in the following language:

> "Assignor expressly reserves to himself, his heirs and assigns, an undivided 1/4th of 7/8ths of the oil and gas produced and saved from said land above described under said lease, same to be delivered free

of cost to the credit of assignor into the pipe line to which the well or wells may be connected, said reserved interest to be considered and in effect an overriding royalty interest."

This 1/4th of 7/8ths overriding royalty interest was "reserved" out of the assignment and never passed to Wadley, and respondents were not the legal "owners," although they were and are entitled to recover the interest by the pending suit, in which Brown had already filed answer "that he holds the title to said overriding royalty for the use and benefit of said A. L. Willis * * * " (R. 26).

In *40 Tex. Jur.*, Sec. 68, it is stated:

"Minerals in place are realty, and real property is ordinarily taxed as a unit.

" 'Yet, where there have been severances by conveyance, exception or reservation, so that portion of the realty belongs to one person and other portions to others, each owner should pay taxes under proper assessment against him of the portion owned by him.' "

In Section 102 of *40 Tex. Jur.*, we find this statement:

"The Constitution (Art. 8, Sec. 11), provides that 'all lands and other property not rendered for taxation by the owner thereof shall be assessed at its fair value by the proper officer.' And according to R. S., Art. 7193:

" 'In all cases of failure to obtain a statement of real and personal property from any cause, the as-

sessor of taxes shall ascertain the amount and value of such property and assess the same as he believes to be the true and full value thereof; and such assessment shall be as valid and binding as if such property had been rendered by the proper owner thereof.' "

It was the duty of the "owner" of this interest—not of the parties seeking to recover it by suit—to render it for taxation, and, failing in that duty, it was the assessor's duty to assess such interest to the "owner." Presumably petitioners would have shown, if they could, that they dutifully rendered the overriding royalty interest year by year during the long period of this litigation and paid taxes thereon as the owner, but no such proof was made except that Willis did pay the 1947 taxes, though not on his *own rendition*. Apparently Willis has never made a rendition of this overriding royalty interest as owner, but we are sure that he would not admit that his failure to render and pay taxes on this interest all these years is an admission that he did not own the interest and that such tacit admission should prevail over his assertion of title in the pending suit. Still, the argument petitioners are making on this tax rendition question has little better probative value.

It happens, therefore, that Gillespie did give the right opinion and advice to the assessor, according to the legal interests. Since he was correct in the view that he expressed, there is no purpose in speculating on why he

expressed it, other than to say that it would be absurd to contend that he intended to throw away the title to the entire overriding royalty interest in order to save one year's taxes on that interest.

In *61 C. J.*, page 207, it is said:

> "The person having legal title to property is ordinarily regarded as the owner thereof for purposes of taxation. This does not mean that the person assessed must have a perfect and unencumbered title to the property, but only that he should be vested with the apparent legal title, as where he is the owner of record, or with the possession coupled with such claims and evidences of ownership as will justify the assumption that he is the owner; and assessors are not required to go behind the records and search out unrecorded transfers or anticipate the judicial settlement of a title which is in litigation."

In *Lester vs. Hudspeth, et ux*, 184 S.W. (2d) 467, the Supreme Court of Texas held that the owner of the record legal title, though he had contracted to sell realty to another, was the "owner" of realty within the purview of the applicable paving statutes when special assessments were levied thereon for street improvements, and that, in the absence of notice of the equitable title, one who had acquird the record legal title to the property at the foreclosure sale was the owner within the purview of the paving statutes.

In *Childress County vs. State, et al.*, 92 S.W. (2d) 1011, the Supreme Court of Texas held that school land,

after it had been sold by the county, becomes the property of the vendee for the purposes of taxation, though the sale be made on credit or under executory contract, and the county is not entirely divested of title to the land until it is fully paid for, but, until forfeiture or rescission takes place, the vendee must be regarded as the owner, and the land may be sold for taxes as his property. In the course of the opinion the Court said:

> "The person having legal title to property is generally considered to be the owner thereof for purposes of taxation. The person assessed need not have a perfect or unencumbered title to the land to make the assessment legal. If he is the record owner, or is vested with the apparent legal title, or is in possession thereof, coupled with such claims and evidences of ownership as will justify the assumption that he is the owner thereof, the assessor will be justified in assessing the property for taxation against such owner. 61 C. J., p. 207, and authorities cited in the notes."

(6) Gillespie Was Not Wadley's Agent.

The judgment in this case was that Respondent J. K. Wadley recover the overriding royalty interest, subject to the rights of the other respondents to the repayment of certain expenses of exploration and production (R. 52-53). A. L. Willis was Wadley's agent, and it was Wadley's confidence that was betrayed. Gillespie was not Wadley's agent and Wadley could not have been prejudiced by any act done or performed by Gillespie *pendente lite.*

(7) No Effect Can Be Given to McDuffie's Testimony, Because There Was No Plea of Waiver Based on the Tax Rendition.

The retrial of this case was on the same pleadings as the first trial. No amended pleadings were filed in the interim between the two trials. The petitioner, A. L. Willis, went to trial the second time on his Answer to Second Amended Complaint (R. 18-25). It contains no plea of waiver or ratification on account of the method of tax rendition or statements made in connection therewith. As a result of petitioners' failure to plead this special defense, respondents, naturally, could not anticipate that such testimony would be offered, or be prepared to clarify the record as to Gillespie's actual position or authority in the matter. In any event, however, no effect can be given to any of this testimony. In *43 Tex. Jur.*, at page 899, it is said:

> "Even though waiver be established by proof without objection, effect cannot be given to the facts so proven in the absence of a plea of waiver."

In support of the above text is cited the case of *Carson vs. Taylor* (Civ. App.), 238 S.W. 261 (error dismissed), in which the Court says:

> " . . . Even though waiver be established by proof without objection, effect cannot be given to the facts so proven, in the absence of a plea of waiver. Moody vs. Rowland, 100 Tex. 363, 99 S.W. 1112; Aetna Insurance Co. vs. Holcomb, 89 Tex. 404, S.W. 915; Scarbrough vs. Alcorn, 74 Tex. 358, 12 S.W. 72; Murchison vs. Mansur-Tibbetts Implement Co.

(Tex. Civ. App.), 37 S.W. 605. And the same may be said of the defense of equitable estoppel as distinguished from waiver. Ross vs. Moskowitz (Tex. Civ. App.), 95 S.W. 86; Texas Produce Co. vs. Turner (Tex. Sup.), 27 S.W. 583; Word vs. Marrs, 36 Tex. Civ. App. 637, 83 S.W. 17."

In the case of *Federal Union Ins. Co. vs. Hardin*, 115 S.W. (2d) 1144, at page 1145, the Court of Civil Appeals at Amarillo quotes the above rules from *43 Tex. Jur.*, and adds:

> *"This text is supported by numerous authorities and is unquestionably the law."* (Emphasis added.)

The Court of Civil Appeals at El Paso, in the case of *Hodges vs. Cole*, 117 S.W. (2d) 822, at page 825 again proves the rule:

> " . . . If they had waived the rights asserted by them, such waiver was available to appellant as a defense. It was not material in any other respect and it is a well-established rule of law that when waiver is relied upon it must be specially pleaded by the party who relies upon it. Even though it be established by proof, without objection, the rule is that no effect can be given to it in the absence of a pleading in which it is specially alleged. Moody & Co. vs. Rowland, 100 Tex. 363, 99 S.W. 1112; Murchison vs. Mansur-Tibbetts Implement Co., Tex. Civ. App., 37 S.W. 605; Aetna Ins. Co. vs. Holcomb, 89 Tex. 404, 34 S.W. 915; Scarbrough vs. Alcorn, 74 Tex. 358, 12 S.W. 72; Carson vs. Taylor, Tex. Civ. App., 238 S.W. 261; Fisher vs. Russell, Tex. Civ. App., 204 S.W. 143."

A still later case citing and supporting the Texas Juris-

prudence text is *City of Wichita Falls vs. Bruner*, 191 S.W. (2d) 912, in which the Court says:

> " . . . There is yet another all-sufficient reason why appellant cannot rely upon waiver by appellees; it did not plead waiver as a defense. Many decisions handed down prior to the present Rules of Procedure announce the necessity of such a pleading. The same principle is brought forward by the specific provisions of Rule 94, Texas Rules Civil Procedure. Absent a pleading of this defense, appellant cannot now rely upon it."

We submit that in view of the Texas authorities which we have cited in this brief, there can be no question but that the claimed waiver and ratification was correctly decided by the Court of Appeals in the light of the applicable Texas authorities, both with respect to the tendering back of the lease and the action of Gillespie.

CONCLUSION.

We confidently assert that there is no valid cause for the exercise of this Honorable Court's discretion in the granting of a writ of certiorari. The law of the State of Texas was conscientiously and meticulously followed by the Court of Appeals for the Fifth Circuit in its three opinions. The holding and decision of the court below was correct, and now, after almost six years, an end of litigation should be made.

Respectfully submitted,

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